PARAMAHA ENTERPRISE SDN BHD & ORS v. THE GOVERNMENT OF THE STATE OF SABAH & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ RAHIM JCA
ROHANA YUSUF JCA
ABANG ISKANDAR JCA
[CIVIL APPEAL NO: S-01-439-2011]
19 JANUARY 2015

CONTRACT: *Breach – Agreement – Contract to develop land – Contractual term that proposed development to be completed not later than eight years and time would be of the essence – Breach of agreement for failure to commence construction works – Allegation of – Issuance of notice of termination – Whether developer breached agreement – Whether there was just cause for delay – Whether project between parties a joint-venture enterprise – Whether termination of agreement justified*

By a written agreement entered by the first appellant ('the first plaintiff') and the first respondent ('the first defendant') in 1996, the latter appointed the former as the developer of a parcel of land ('the proposed development'). The second to the 12th plaintiffs were the first plaintiff's appointed nominees under the said agreement and subsequently became the registered owners of each of the lots alienated to them. Under the agreement, the plaintiffs were to complete the proposed development not later than eight years and that time would be of the essence. However, in 2003, the first defendant issued a notice of termination as it was alleged that the plaintiffs had breached the said agreement by failing to commence construction works. This prompted the plaintiffs to file an action in the High Court on the ground that the termination was unlawful. The plaintiffs further contended that the delays were caused by the first defendant because the first defendant had made amendments to the developments plans but the relevant State Authorities had yet to approve the several plans necessary for the development to be carried out. The first defendant counterclaimed and sought declarations that (i) the plaintiffs were in breach of the said agreement in failing to carry out and complete the development within the stipulated time without just cause; (ii) the first defendant was entitled to terminate the said agreement under cl. 15.2; and (iii) the plaintiffs as trustee under a constructive trust pending the fulfilment of all the obligations under the agreement and for an order that the plaintiffs surrendered the land titles alienated to and registered in their names for the same to be cancelled. The High Court dismissed the plaintiffs' claim and allowed the first defendant's counterclaim. Dissatisfied with the said decision, the plaintiffs filed the present appeal. The issues that arose for the court's adjudication were (i) whether the trial judge erred in failing to consider the evidence from the perspective that the project between the parties was a joint-venture enterprise; and (ii) whether the various delays in the implementation of the proposed development by the plaintiff would justify the first defendant to terminate the contract.

Held (dismissing appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The plaintiffs had no basis to complain against the trial judge's non-finding on the status of the contract being a joint-venture project. It was never pleaded as such and neither was it pleaded in the alternative to be a joint-venture. The trial judge had not erred in not addressing his mind to the issue of the status of the contract between the parties as a joint-venture agreement. (paras 16 & 17)

(2) The agreement itself contained in express terms as to what each party had agreed to amount to breaches by the plaintiff/developer. The agreement also contained, within its four walls, the remedies as to what the first defendant shall be entitled to. All these important terms were contained under cl. 15 of the agreement. (para 27)

(3) Looking closely at para. 6.1(b) of the agreement, the party who could not fulfil the deliverables on time could apply to the other party for an extension of time in which case time would not be at large. The purpose of this provision, must of necessity be, to ensure that the duration of time within which the project was to be completed could be monitored closely and that the project could really be performed, so as to enable delivery. However, there had been no invocation of the provisions of this very useful paragraph, which was an agreed in-built mechanism in the agreement, by the first plaintiff. (paras 36, 37 & 38)

(4) This agreement to develop the area had basically been a commercial venture. Even after seven years since the signing of the agreement, nothing of substance had been delivered by the first plaintiff. The trial judge was not in error when he concluded that there was a total failure of consideration moving from the first plaintiff to the first defendant. Commercial sense would warrant termination of the agreement, which was exactly what the first defendant had done. (paras 42 & 44)

Bahasa Malaysia *Translation Of Headnotes*

Melalui perjanjian bertulis yang dimeterai oleh perayu pertama ('plaintif pertama') dan responden pertama ('defendan pertama') pada tahun 1996, defendan pertama telah melantik plaintif pertama sebagai pemaju sebidang tanah ('cadangan pembangunan'). Plaintif kedua hingga kedua belas merupakan penama-penama yang dilantik di bawah perjanjian tersebut dan seterusnya menjadi pemilik-pemilik berdaftar setiap lot yang diberi milik kepada mereka. Di bawah perjanjian tersebut, plaintif-plaintif perlu menyempurnakan cadangan pembangunan tersebut tidak lebih daripada lapan tahun dan masa adalah asas. Walau bagaimanapun, pada tahun 2003, defendan pertama mengeluarkan notis penamatan dengan mendakwa bahawa plaintif-plaintif telah melanggar perjanjian tersebut kerana gagal untuk memulakan kerja-kerja pembangunan. Ini menyebabkan plaintif-plaintif memfailkan satu tindakan di Mahkamah Tinggi atas alasan bahawa

penamatan tersebut adalah tidak sah. Plaintif seterusnya menghujahkan bahawa kelewatan disebabkan oleh defendan pertama kerana defendan pertama telah membuat pindaan kepada pelan-pelan pembangunan tetapi Pihak Berkuasa Negeri yang relevan belum meluluskan beberapa pelan yang perlu untuk menjalankan pembangunan tersebut. Defendan pertama menuntut balas dan memohon pengisytiharan bahawa (i) plaintif-plaintif telah melanggar perjanjian tersebut dengan kegagalan untuk menjalankan dan menyempurnakan pembangunan dalam masa yang ditetapkan tanpa alasan yang adil; (ii) defendan pertama berhak untuk menamatkan perjanjian tersebut di bawah kl. 15.2; dan (iii) plaintif-plaintif sebagai pemegang amanah di bawah amanah kontstruktif sambil menunggu penyempurnaan obligasi-obligasi di bawah perjanjian dan bagi satu perintah agar plaintif-plaintif menyerahkan hak milik yang diberi milik dan didaftarkan di bawah nama mereka bagi tujuan yang sama, dibatalkan. Mahkamah Tinggi menolak tuntutan plaintif-plaintif dan membenarkan tuntutan balas defendan pertama. Tidak berpuas hati dengan keputusan tersebut, plaintif-plaintif memfailkan rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah (i) sama ada hakim bicara terkhilaf dalam kegagalan untuk mempertimbangkan keterangan daripada sudut bahawa projek antara pihak-pihak merupakan perusahaan usahasama; dan (ii) sama ada pelbagai kelewatan dalam pelaksanaan cadangan pembangunan oleh plaintif-plaintif mewajarkan defendan pertama untuk menamatkan kontrak.

Diputuskan (menolak rayuan dengan kos)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Plaintif-plaintif tidak mempunyai asas untuk mengadu mengenai kegagalan hakim bicara untuk memutuskan mengenai status kontrak sebagai projek usahasama. Ia tidak diplidkan sedemikian mahupun diplidkan secara alternatif sebagai usahasama. Hakim bicara tidak khilaf dalam tidak mengarahkan minda beliau kepada isu status kontrak antara pihak-pihak sebagai perjanjian usahasama.

(2) Perjanjian tersebut dengan sendirinya mengandungi terma nyata mengenai persetujuan pihak-pihak berkenaan apa yang terjumlah sebagai pelanggaran oleh plaintif/pemaju. Perjanjian juga mengandungi, dalam ruang lingkupnya, remedi-remedi yang mana defendan pertama berhak ke atasnya. Kesemua terma-terma penting ini terkandung dalam kl. 15 perjanjian.

(3) Meneliti perenggan 6.1(b) perjanjian, pihak yang tidak boleh menyempurnakan apa yang perlu dilaksanakan tepat pada masanya boleh memohon daripada pihak yang satu lagi bagi lanjutan masa, dalam mana masa bukanlah tidak bertempoh. Tujuan peruntukan adalah ternyata sebagai keperluan untuk memastikan bahawa tempoh masa bagi menyempurnakan projek tersebut boleh dipantau dengan teliti dan

bahawa projek boleh dilaksanakan, untuk membolehkan pelaksanaan. Walau bagaimanapun, peruntukan perenggan berguna ini, yang merupakan mekanisme terbina yang dipersetujui dalam perjanjian, tidak dibangkitkan oleh plaintif pertama.

(4) Perjanjian untuk membangunkan kawasan tersebut merupakan usaha komersil. Walaupun selepas tujuh tahun menandatangani perjanjian tersebut, tiada apa-apa yang bermanfaat yang dilaksanakan oleh plaintif pertama. Hakim bicara juga tidak terkhilaf apabila beliau memutuskan bahawa terdapat kegagalan penuh balasan daripada plaintif pertama kepada defendan pertama. Kecirian komersil akan mewajarkan penamatan perjanjian, yang mana telah dilakukan dengan tepat oleh defendan pertama.

Case(s) referred to:

Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Chua Chay Lee & Ors v. Premier Properties Limited [2000] 4 SLR 177 ***(refd)***

Clarke v. Edinburgh Tramways Co [1919] SC (HL) 35 ***(refd)***

G Percy Trentham Ltd v. Archital Luxfer Ltd [1993] 1 Lloyd's 1 Rep 25 ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48 HC ***(refd)***

Howard v. Pickford Tool Co Ltd [1951] 1 KB 417 ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***

Universal Cargo Carriers Corp v. Citati [1957] 2 QB 401 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 47

Land Ordinances (Sabah Cap. 68), s. 34

For the appellants - Ansari Abdullah Ali (Erveana Ansari with him); M/s Ansari & Co
For the respondents - Roderic Fernandez (Govinder Raj & Hanafiah Kassim with him); State Counsel (Sabah)

[Editor's note: For the High Court judgment, please see Paramaha Enterprises Sdn Bhd & Ors v. The Government Of The State Of Sabah & Anor [2012] 10 CLJ 646.]

Reported by Najib Tamby

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] By an agreement in writing dated 25 May 1996 between the first plaintiff and the first defendant ('the said agreement') the first defendant agreed to appoint the first plaintiff as the developer of a parcel of

approximately 128.42 acres of; and, adjacent to the Kota Kinabalu International Airport and the beach at Tanjung Aru, Kota Kinabalu ('the proposed land') into an integrated tourist resort known as Kota Kinabalu Beach Resort ('the proposed development'). A

[2] The second to the 12th plaintiffs are the first plaintiff's appointed nominees under the said agreement and subsequently became the registered owners of each of the lots which were alienated to them for the development pursuant to the said agreement. The plaintiffs were to complete the proposed development not later than eight years from the date of the said agreement. It was agreed between the parties that time would be of essence. B

[3] However, the first defendant had issued notice of termination dated 28 May 2003 on the ground that the plaintiffs had breached the said agreement by failing to commence construction works on Lot 5A and Phase 1 of the proposed development within stipulated date in the said agreement. C

[4] On 11 April 2005, the plaintiffs filed an action to the High Court at Kota Kinabalu where it was contended that the termination was unlawful because the first defendant had made amendments to the development plans, the relevant State Authorities had yet to approve the several plans necessary for the development to be carried out and the delays were caused by the first defendant. The plaintiffs sought a declaration that: D

(i) The termination of the said agreement by the first defendant was invalid and void; E

(ii) Payment of a sum of RM589,624,860 being loss of profit; or

(iii) In the alternative, payment sum of RM40,000,000 being costs and expenses incurred by the plaintiffs for works done pursuant to the said agreement and for general and exemplary damages to be assessed for breach of contract. F

(iv) That the first defendant through the second defendant had designed a plan to injure the plaintiffs by unlawful means which they described as 'abuse of process' ie, by causing the second defendant to issue show cause notices to the second to 12th plaintiffs under s. 34 of the Sabah Land Ordinance why the first defendant should not re-enter and resume the lands registered in the name of the second to the 12th plaintiffs for breach of the conditions of the land titles. G H

[5] The first defendant had counterclaimed and sought a declaration that:

(i) The plaintiffs were in breach of the said agreement in failing to carry out and complete the development within the stipulated time without just cause; I

(ii) A declaration that the first defendant was entitled to terminate the said agreement under the cl. 15.2(a) thereof;

(iii) The plaintiffs as trustee under a constructive trust pending the fulfilment of all the obligations under the agreement and for an order that the plaintiffs surrendered the land titles alienated to and registered in their names for the same to be cancelled thereto.

[6] The High Court at Kota Kinabalu on the first of July 2011 having heard evidence led by all parties had dismissed the plaintiffs' claims and allowed the first defendant counterclaim and further had ordered that costs awarded to the defendants to be taxed.

[7] Dissatisfied with the decision of the High Court at Kota Kinabalu, the plaintiffs had filed an appeal against the impugned decision. Hence, this appeal before us.

The Appeal

[8] We had heard the parties in their respective submissions before us at Putrajaya, upon their joint request for the same. We had indicated to parties that we would need more time to look closely at the materials placed before us in light of the able submissions put forth by both learned counsels. We had also informed parties that they would be notified of the date of our decision accordingly. This is our decision.

[9] This appeal by the plaintiffs has basically been concerned with the determination of whether in the circumstances of this case, the termination by the first defendant had been, for all intent and purposes, a valid one. We are ever mindful of the words of learned Lord Justice Asquith in the case of *Howard v. Pickford Tool Co Ltd* [1951] 1 KB 417 at p. 421 therein, where His Lordship had said in relation to an unaccepted repudiation in that such an act does not terminate the contract. His Lordship went on to describe such repudiation as follows:

> It is a thing writ in water, and of no value to anybody; it affords no right of any kind.

[10] Having also perused and considered the records of appeal, we are of the view that this appeal by the plaintiffs/appellants ought to be dismissed and we so hold. For ease of convenience, we will in our grounds refer to the parties as they appeared in the court below before the learned trial judge.

[11] Having looked at the impugned decision of the High Court, it was clear to all concerned with this appeal that the learned trial judge had decided that the first defendant had terminated the agreement in accordance with the provisions of the agreement. In other words, the termination by the first defendant had been valid. The learned trial judge had also allowed the counterclaim by the first defendant, which basically had prayed for the 11 land titles transferred into the names of the nominees of the first plaintiff to be re-transferred back in the name of the State Authority.

[12] What the first plaintiff had promised to the first defendant had been that it would deliver the completed proposed development within a period of "eight [8] years from the date of the Commencement Date for the Lot 5A entitlement with such extensions as shall be permitted in this Agreement." This formed part of the covenants that was agreed by the first plaintiff, being the developer of the project by virtue of cl. 6.1(b). Further, pursuant to cl. 24 of the agreement, it was provided that "Time whenever mentioned shall be the essence of this Agreement."

[13] On its part, the first defendant had its own share of covenants under this agreement, and among the prominent ones are contained in cls. 7(b) and (c). Under cl. 7(c) it is stipulated that the first defendant agreed and covenanted to "use its best endeavour to assist the Developer to obtain all approvals from the relevant authorities in respect of the Relevant Plans for the Proposed Development." Under cl. 7(b)(ii), it had also covenanted to issue the land titles to the respective plaintiffs who were nominees of the first plaintiff. No specific time-line was stated for the 'best endeavour to assist' but in respect of the delivery of land titles, it was to be done after the lands had been surveyed and it was the obligation of the first plaintiff to carry out the survey works in respect of the lands in question. There were delays in getting the lands surveyed as a result of which the first defendant could only deliver the land titles to the respective plaintiffs in 2000 at the earliest.

[14] As had transpired between the parties in this litigation, the first plaintiff had failed to deliver on its promise to deliver to the first defendant what it was entitled to in the agreement. When the first defendant saw that it was apparent that the first plaintiff would not be able to deliver on its covenanted promise to deliver the government entitlement within the stipulated time frame, the first defendant had triggered its right to terminate the agreement as provided for under cl. 15.2 of the agreement. Clause 27 of the agreement further stipulated that "It is agreed that this Agreement shall be discharged by performance and performance alone." Clause 23 had also provided, among others, that the effected party in the event of default having been committed by the other party, shall be entitled to the remedy of specific performance. This remedy for specific performance was one remedy that was available to the first defendant and its existence does not in any way preclude the first defendant's right to terminate the agreement in the event of default by the plaintiffs, as it had done in this case.

[15] In the course of filing the written submissions, learned counsel for the plaintiffs had advanced a new issue that was never pleaded in the pleadings as contained in the statement of claim. A substantial amount of space and energy appeared to have been put into the effort in order to convince us that the issue was deserving of our consideration at this very late stage. Of course the defendants had objected to this late introduction of a substantial issue by the plaintiffs. From the submissions, we could glean that the essence of the

premise for excusing this late introduction has been that the evidence was there in the notes of proceedings and it is open for this court to decipher the evidence that would eventually carve out a strong case in favour of the plaintiffs that this whole project involving the parties had indeed been, in essence a joint-venture enterprise. It was submitted on behalf of the plaintiffs that the learned trial judge had erred when he failed to consider the evidence from that perspective and he had therefore erroneously dismissed the plaintiffs' claim on the sole basis that the dispute between the parties had been premised on the breach of the contractual obligations on the part of the plaintiffs. According to Encik Mohd Ansari, the learned counsel for the plaintiffs, had the trial judge considered such evidence in its proper context, he would have found that the first defendant had breached its fiduciary duty as a partner in a joint-venture enterprise, in which case the plaintiffs would be entitled to damages as a result thereof.

[16] We had considered this part of the appeal and we must reiterate that the plaintiffs really had no basis to complain against the learned trial judge's non-finding on the status of the contract as being a joint-venture project. To begin with, it was never pleaded as such, and neither was it pleaded in the alternative to be a joint-venture. We noted what was pleaded in the alternative had been for damages for work done by the first plaintiff. We noted further that there was an allegation of conspiracy between the first and second defendants to injure the plaintiffs. We noted too, that the prayer related to this allegation was later on abandoned by the plaintiffs.

[17] The legal position on pleadings is trite. Parties in a suit are bound by what they have pleaded in their respective pleadings. Likewise, a party cannot bind the other party, let alone the court, on an issue that it never pleaded in the first place. In this case, there was no evidence to show that there was any amendment being applied by the plaintiff to plead the issue of joint-venture. Indeed there may be exception to this general rule on pleadings, but still that exception requires that evidence was led in court on the issue of joint-venture and the adverse party was aware that it was being invited to address an issue that was never in the pleadings of his opponent and that there was full and mature ventilation of the very issue by both parties consciously. That would appear to be the approach taken by the Court of Appeal in the case of *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585. However a perusal of the appeal records in this appeal before us had not shown that such mature ventilation had indeed been pursued by the plaintiff. As such, there is no cogent reason for this court to accede to the plaintiffs' request for the issue on 'joint-venture' to be ventilated at this eleventh hour before us. The learned trial judge did not err in not addressing his mind to the issue of the status of the contract between the parties as a joint-venture enterprise.

[18] Now, the main complaint that had driven the plaintiffs' suit against the first defendant had been its allegation that the first defendant had wrongly terminated the agreement. The law on termination of contract is rather settled. Its trigger must be premised on a commission of a fundamental breach by the party alleged to be in default. As regards the timing as to when the aggrieved party can throw in the proverbial towel and be heard to say: "Enough is enough", it can terminate the contract within a reasonable time, where there is no specific provision relating to such an event in reference to the contract. In fact s. 47 of our Contracts Act 1950 is the statutory provision that deals with such a situation. The first defendant had given the first plaintiff the required three months' notice of termination of its intention not to be further bound by the agreement with the first plaintiff. The termination letter had outlined the reasons for the termination which the plaintiffs had since challenged in court as being invalid.

[19] In the context of our instant appeal, the only question that needed to be asked and answered would be whether the various delays in the implementation of the proposed development by the plaintiffs would justify the first defendant to throw away the contract and be done with it. Everything else will flow from there. The learned trial judge had correctly alluded to the consequences that would follow in the event of a lawful and valid termination of the agreement, as could be seen in his decision, like so: "The right to terminate puts an end to the contract only as to the future rights and obligations. All past rights and duties under the contract remain unaffected": *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269. Clause 15.2(c) of the agreement provided that any work done to the date of termination by the first plaintiff would be forfeited and the first plaintiff would not be entitled to claim for any work done on a quantum meruit basis from the first defendant.

[20] And the 'explanation' to that s. 47 of the Contracts Act 1950 has expressly provided that "the question of 'what is reasonable' is, in each particular case, a question of fact." Looking at the uncontroverted facts in this case, there had been delays on the part of the first plaintiff such that none of the portions of the project had taken off the ground, let alone a substantial portion of it, despite the fact that about seven years had passed since the signing of the agreement in 1996. The delays had not been isolated in nature, but were repeated over a period of time. In such a situation, what ought to be the legal position?

[21] To our mind, the correct legal position was provided by Lord Devlin in the case of *Universal Cargo Carriers Corp v. Citati* [1957] 2 QB 401 where His Lordship had said:

> The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it.

[22] Indeed in the *Citati* case *(supra)* Lord Devlin had also said:

> … as a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it follows that the breach which he anticipates is of the same character as the breach which would actually have occurred if he had waited.

[23] This case was cited with approval in the Singaporean case of *Chua Chay Lee & Ors v. Premier Properties Limited* [2000] 4 SLR 177.

[24] From the evidence that had been adduced in this case before us, it was clear to our mind that the plaintiffs were not able to perform its part of the bargain as contained in the agreement. Tough or harsh might the terms of the agreement appear to be, as was correctly observed by the learned trial judge, the agreement was entered into on level terms by both parties with both eyes wide open. The kind of breach is the same, namely the delays on the part of the first plaintiff. We agree with the learned trial judge as to how the first plaintiff could perform the project on time, given the inordinate delays which had plagued the project since its inception. Again, as was rightly observed by the learned trial judge, after years had passed since the signing of the agreement, nothing had been delivered to the first defendant by the first plaintiff. In the circumstances, the first defendant was entitled to anticipate an inevitable event, namely the delay, an event of the same character of the breach which would actually have occurred if he had waited.

[25] In the case of *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48 the court there was also faced with the complaint by the plaintiff that the defendant had wrongfully terminated the contract. Learned Justice Edgar Joseph Jr had this to say:

> I am satisfied that even if we had a valid notice to complete been served on the plaintiff, in view of his lack of financial resources, the plaintiff would not have been able to comply with a valid notice to complete if it had been given and so the plaintiff was in anticipatory breach by reason of impossibility of performance.

[26] Premised upon that consideration, the plaintiff in the *Goh Hooi Yin*'s case was justified in terminating the contract with the defendants.

[27] In this instant appeal before us, the agreement itself contained in express terms as to what each party had agreed to amount to breaches by the first plaintiff/developer. The agreement also contained within its four walls, the remedies as to what the first defendant, being the Government, shall be entitled to. All these important terms were contained under cl. 15 of the agreement. In our view the learned trial judge had rightly identified the relevant terms and had addressed his mind on them in the context of the evidence that were led before him by both parties. We now reproduce the relevant portion of his decision, as follows: "The issue to be determined is whether the letter of termination dated 28 May 2003 was valid and lawful". From a reading of the agreement, the main terms were as follows:

(a) Clause 1.1 provided that the first plaintiff was to construct and complete the development on the lots together with the amenities, utilities and infrastructure in accordance with the land use or zoning specified in the conceptual plan annexed as schedule 3 and subject to the terms and conditions of the agreement.

(b) According to cl. 2.1, schedule 3 and schedule 4, the development would include a five-star hotel on Lot 1, a three-star hotel on Lot 2, residential development on Lot 4 and government residential development on Lot 5A and Lot 5B.

(c) Under cl. 2.3, the first defendant's entitlement under the development consisted of (a) Lot 5A being 100 units of staff quarters and 114 units of division 2 quarters, (b) Lot 5B being 90 units of division 1 quarters, (c) Lot 4 certain units of dwelling units as ascertained in cl. 2.6, (d) a new multi-purpose hall, (e) a new Prince Philip Park, and (f) upgrading and alignment of the Tanjung Aru Beach.

(d) Under cl. 4, in consideration of the completion and delivery of the first defendant's entitlement under the development, the first plaintiff would be entitled to the rest of the development on the land and for these purposes, the first defendant would alienate the 11 lots to the first plaintiff and/or its nominees subject to the submission of an application for the 11 lots of land by the first plaintiff, subject to a final survey and subject to the first plaintiff providing a bank guarantee in a sum equivalent to the value of each title so alienated and ascertained at a rate of RM778,694.90 per acre and which valuation was set out in Schedule 5.

(e) Clause 5.1 provided that the first plaintiff would within six months from the date of the agreement carry out at its own costs and expenses, preliminary work required for the development being the survey work, soil investigation, preparation and submission of the development plan to the relevant authorities for approval.

(f) Clause 6.1(b) provided that the first plaintiff would develop the said lots and to complete the proposed development in accordance with the relevant plans approved by the relevant authorities, with the terms and conditions contained in the agreement and the terms and conditions in the land titles. The development was to be completed on or before the expiry of eight years from the commencement date for the Lot 5A entitlement, with such extension as would be permitted in the agreement.

(g) Under cl. 3.1, the development was to be completed in phases in accordance with the schedule of implementation in Schedule 4 which *inter alia* provided that the multi-purpose hall and the Prince Philip Park were to be completed within one and a half years from the date of

commencement, the government residential development in Lot 5A was to be completed within two years from the date of commencement, the development commencement date was to be not later than nine months from the date of the approval of all the relevant plans for the lot concerned provided the title deed for the lot concerned had been issued.

(h) Clause 24 provided that time whenever mentioned "shall be of the essence of this agreement".

[28] In fact, the learned trial judge had considered the whole agreement and the inter-play between those clauses in interpreting them before arriving at his various findings of facts. Clearly he had not analysed those clauses in isolation.

[29] From the evidence, both parties were in agreement that there were delays pertaining to the implementation of the proposed development. The fulcrum upon which the plaintiffs had launched its suit against the defendants had been the alleged waiver that was given by the defendants in relation to the delays. It was contended by the first plaintiff that the first defendant had waived the delay in the performance of the construction as the latter was much aware of the circumstances that had not enabled the first plaintiff to begin construction of the project. We noted that the learned trial judge had considered this issue on the alleged waiver in his decision. We reproduce here what he had said his grounds of decision, as follows:

> [31] Clause 18(a) of the agreement provided that no failure or delay on the part of any party in exercising any power or right would operate as a waiver nor would any single or partial exercise of such right or power preclude any other further exercise of any other right or power under the agreement. Clause 31 of the agreement provided that no variation amendment modification or waiver of any provision of the agreement would in any event be of force or effect unless the same was confirmed in writing by the relevant parties. Reading these two clauses together, for a waiver to be effective the same must be in writing or confirmed in writing. From the evidence before the court, the 1st Defendant did not waive the obligations of the 1st Plaintiff in particular under cls. 4.5, 6.1(a), 6.1(b) and 6.1(j) of the agreement in writing.

[30] We had looked at the contract document constituting the agreement. Indeed, the learned trial judge was correct in the manner in which he had dealt with the waiver issue. The basis for his decision on the waiver issue was expressly contained in cl. 31 of the agreement under the matter of 'VARIATION' which reads as follows:

> No variation amendment modification or **waiver** of this Agreement shall in any event be of force or effect unless the same shall be confirmed in writing by the relevant parties hereto. (emphasis added)

[31] In fact, cl. 18 which dealt specifically on waiver had provided as follows: "that no such waiver shall be valid *unless made in writing by the developer*." (emphasis added)

[32] It would appear, in our view, quite clearly that cl. 31 had the effect of reiterating the need for any such waiver to be in writing before it could have any binding effect on the relevant party.

[33] We then had gone on to look at the evidence as contained in the appeal records, to see if there was such evidence of a written confirmation on the part of the first defendant that it was waiving its rights that had pertained to the delays on the part of the first plaintiff, in the sense that such delays were in fact forgiven. In the final analysis, we had not been able to find such evidence forthcoming from any of the witnesses' evidence nor from the numerous bundles of documents that had been adduced before the learned trial judge. In this regard, we could not find any evidence of a confirmation in writing by the first defendant that it was waiving the inordinate delays on the part of the first plaintiff *vis-à-vis* the implementation of the project. Neither have we been able to sight documents that could emanate from the first plaintiff indicating its desire for the first defendant to waive its rights on the matter. As such, we could find no basis to disturb the learned judge's conclusion on this issue of waiver that was raised by the first plaintiff.

[34] We cannot but state here that this contract between the parties had been that that could only be discharged by way of performance. Such observation was also made by the learned trial judge at para. 31 of his decision where he had stated:

> [32] In the agreement, it must be noted that cl. 15 provided for 'event of breach' by the 1st Plaintiff as the developer but the agreement did not include a similar provision for 'events of breach' by the 1st Defendant. Bearing in mind that the 1st Defendant's primary obligation was to alienate the lands on which the development was to be carried out and the lands having been alienated to the 1st Plaintiff or its nominees, cl. 27 specifically provided that the agreement 'shall be discharged by performance and performance alone'. The evidence showed that the 1st Plaintiff had failed to perform its promise in its entirety.

[35] We had alluded to this feature of this contract in the preceding paragraphs of our judgment. We had even mentioned the specific provisions in this contract that had expressly stipulated it to be so.

[36] In fact, when one were to look closely at para. 6.1(b) of the agreement, it would appear very clear in our view that the party who could not fulfil the deliverable on time, could apply to the other party for an extension of time in which in this case time would not be at large. That cl. 6.1(b) appears under the 'DEVELOPER'S COVENANTS' and we reproduce that cl. 6.1(b) as follows: "To develop the said Lots and to complete the Proposed Development at its own costs and expenses in accordance with the Relevant Plans approved by the relevant authorities and the terms and conditions set

A out in this Agreement and the land titles. **The Proposed Development shall be completed on or before the expiry of eight years from the commencement date for the Lot 5A Entitlement with such extensions as shall be permitted in this Agreement**." (emphasis added)

B **[37]** The purpose of this provision under cl. 6.1(b) to our mind, must of necessity be, to ensure that the duration of time within which the project was to be completed could be monitored closely and that the project could really be performed, so as to enable timely delivery. This interpretation would, in our view, be in line with the express provisions as contained in para. 6.1(a) of the agreement which reads as follows:

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6.1 The developer hereby agrees and covenants as follows:

(a) To prepare and submit the master development plan incorporating the whole of the Proposed Development (herein referred to as "the Development Plan") within six (6) months from the date of this
D Agreement. Upon approval of such Development Plan to prepare and apply within six (6) months of such approval to the relevant authorities for the approval of the building plan and all other relevant plans required for the Hall, the Park, the Beach Front and Phase 1 of the Proposed Development in accordance with the
E Development Plan (such plans together with the Development Plan shall collectively be referred to as "the Relevant Plans");

[38] However, there had been no invocation of the provisions of this very useful paragraph, which was an agreed in-built mechanism in the agreement, by the first plaintiff. The effect of such an application for extension of time
F was clearly spelt out, namely that time which would otherwise continue to run, to the detriment of the first plaintiff, being the developer, would be suspended. From a reading of cl. 10 of the agreement, it is clear that time which is to be excluded from computation is that which is caused by civil commotion, unrest and the like as stated under cl. 10.1(c) of the agreement.
G Time would also not be computed, if the delay had been caused by the first defendant, for instance where modifications to the relevant plan affecting the proposed development had been requested by the first defendant (see cl. 10.1(a)(ii)). Other situations causing delays would require the approval of the first defendant.

H **[39]** Having said that, we must allude to cl. 10.1(b) of the agreement which stated that the time period that ought to be excluded from computation would be "Any period of delay or lay off occasioned by the failure on the part of the Government to deliver vacant possession of the Proposed Land as stipulated in cl. 7(b) herein." Suffice for us to state here that cl. 7(b) related
I to 'THE GOVERNMENT'S COVENANTS' to deliver vacant possession and to deliver the registered title free from encumbrances within six months from the date of completion of the survey. The first defendant also

covenanted to use its best endeavour to assist the first plaintiff to obtain the various approvals from the relevant authorities in relation to the relevant plan for the proposed development. In this regard, we agree with the learned trial judge that the first defendant had discharged both obligations as evidenced by the various documents pertaining to the meetings involving both parties with the various relevant government agencies.

[40] In particular, with regard to the land title, they had been delivered to the first plaintiff and its nominees in the year 2001 and 2003 after the completion of the survey works. The survey works were admittedly the obligation of the first plaintiff as covenanted and it was undisputed fact that there had been delays in getting the survey works completed. It is important to note that the land titles that were given out to the first plaintiff and its nominees had conditions on them which expressly stated that the land titles are given out subject to the fact that the plaintiffs must complete the proposed development as stipulated in the agreement. More significant to this is the fact that the first plaintiff's witness himself had agreed during cross-examination that the plaintiffs had to abide by the said conditions on the title deeds. We agree with Encik Roderic Fernandez, learned counsel for the first defendant that the plaintiffs could not now cry foul about the conditions on the land titles which they had earlier agreed to abide by. Indeed, we agree that in the circumstances, the plaintiffs are now estopped.

[41] The effect of these delays on the part of the first plaintiff had resulted in a situation whereby as at the date of termination by the first defendant namely on 28 May 2003 the first plaintiff had not commenced any work in respect of the Master Development Plan (MDP) in stark defiance of what was contained under cl. 6.1(a) of the agreement. The MDP was approved on 20 June 2000. A good three years had passed since the approval was given. There was no follow-up by the first plaintiff to obtain the necessary approvals. That was about seven years after the signing of the agreement, which had essentially contemplated the completion of the entire proposed development in not more than eight years, as encapsulated under cl. 6.1(b) of the agreement. Reference must be made to the first plaintiff's obligation to develop Lot 5A on the Government's entitlements on the quarters for civil servants, where, as at the time of termination, the basic essentials such as approval for earthworks had not yet been obtained from the DBKK, being the relevant local authority. With respect, we agree with the submissions of learned counsel for the first defendant that "Taking into consideration that the date for the completion of the PD was on 28 May 2003 according to Schedule 4 of the DA and/or in any event not later than 1 January 2004 according to the land titles, there was no possibility that the first plaintiff could complete the PD by the completion date." Apart from an application by the first plaintiff to put time in abeyance because of the Asian economic recession, which was not granted by the first defendant, there had been no

other such application made by the first plaintiff to suspend time in implementing the proposed development within the four walls of the agreement. In fact the bank had recalled on the loan facilities granted to the first plaintiff. On the issue of the bank guarantee, the learned trial judge was correct in his finding that the failure on the part of the first plaintiff to provide for it was an indication that the first plaintiff was not ready to start with any of the phases in the proposed development.

[42] We noted too that this agreement to develop the area has basically been a commercial venture. There cannot be any dispute about that. As such, in interpreting the provisions as contained therein, the approach that must be taken must be one that favours commercial sensibility. In this regard, we agree with the submissions by the learned counsel for the first defendant. Perhaps, a couple of references to the English approach as contained in two decided cases may be illustrative of the point. We will advert to the relevant portions of Lord Steyn's speeches in the two cases, namely *G Percy Trentham Ltd v. Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 and the case of *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749. In the *G Percy*'s case *(supra)* Lord Steyn LJ (as he then was) has this to say:

> ... in practice our law generally ignores the subjective expectations and the unexpressed mental reservation of the parties. Instead the governing criterion is the reasonable expectation of honest men. And in the present case that means the yardstick is the reasonable expectation of sensible businessmen.

[43] Again, in yet another case of *Mannai Investment (supra)* Lord Steyn has said:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretation and undue emphasis on niceties of language ...

[44] As such, it would not be commercially sensible to accede to the contention of the first plaintiff in the manner in which this agreement ought to be interpreted and given effect to. In the context of this case, even after seven years since the signing of the agreement, nothing of substance had been delivered by the first plaintiff. The learned trial judge was not in error when he concluded that there was a total failure of consideration moving from the first plaintiff to the first defendant. Commercial sense would, with respect, warrant termination of the agreement, which exactly the first defendant had done.

Finding Of The Court

[45] The learned counsel for the plaintiffs had tried his level best to persuade us to interfere with the learned trial judge's decision. As to when the appeal court will interfere with a trial court's decision, there are numerous authorities that may be cited to articulate the scenario where interference is not only justified or warranted but is also demanded as a matter of an imperative duty on the appeal court in order to prevent an injustice being occasioned to the aggrieved litigant. It is trite that it will not suffice that the appeal court entertains some doubt as to the correctness of the trial judge's decision. Indeed, in fact and in law, the appellant bears the onus of convincing the appeal judges that the trial judge's decision was wrong and could not be sustained. That principle was established long time ago in the case of *Clarke v. Edinburgh Tramways Co* [1919] SC (HL) 35 in the speech by Lord Shaw of Dunfermline on behalf of the august House of Lords. That principle still is applicable till this day in our legal system. The appeal court will interfere if the trial judge has been shown to have erred either in fact or law or where his findings were made which were incapable of support in terms of the available evidence as led before him. Appellate intervention would also ensue if the trial judge had misdirected himself on the law.

[46] Having considered the decision of the learned trial judge in its entirety in light of the materials placed before us and in light of the able submissions by both learned counsels, oral as well as written, we are of the respectful view that there is no appealable error that had been shown by the appellants before us that could properly justify our appellate intervention. As can been seen above, the learned trial judge had made various findings of facts impacting on the crucial issues. We find that his findings had been supported by the evidence as led before him and his findings had not been without basis. Indeed his findings had been made not without cogent reasons. He had the audio-visual advantage of observing the various witnesses who had appeared and testified before him and he had preferred the evidence given by the witnesses for the defendants. In such circumstance, we have to defer to his decision. He had identified the various instances of breaches that had been committed by the first plaintiff and the other plaintiffs in not observing the covenants that were so fundamental that those breaches had gone to the root of the agreement thereby justifying the act of the termination by the first defendant. The plaintiffs ought not to be allowed to benefit from their own wrongdoing, to wit, by breaching the agreement and then claiming damages from the first and second defendants. We are of the considered view that the learned trial judge cannot be said to be plainly wrong in coming to his decision, such that we would be justified in invoking our appellate powers so as to right an obvious miscarriage of justice. In our view, there has been none here that had needed our curial intervention. In such a circumstance, we need only to cite the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 to remind itself of that solemn rule of practice that has

A almost crystallised into law and which practice has been religiously observed by our courts in exercising their appellate powers. The learned Justice Gopal Sri Ram JCA (as he then was) had said in the said case, like so:

> We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we said there. Suffice
B to say that we re-affirm the proposition that an appellate court will not generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision.

[47] The plaintiffs in our immediate appeal have failed to discharge that onus that was on them to convince this court that the learned trial judge had
C been plainly wrong as to perpetrate an injustice on them as a result of the termination by the first defendant of the agreement.

[48] Premised on the above, this court would with respect, agree with the learned counsel for the first defendant that the termination of the agreement was valid. Clearly to our mind, by the first defendant's letter of termination
D dated 28 May 2003, is not, to echo the words of Lord Justice Asquith in the *Howard*'s case *(supra)*, "... a thing writ in water." It is a document based on sterner stuff and it binds both parties in this case, as to its effect. On the available evidence, we agree with the learned trial judge that the plaintiffs had failed to prove their case against the defendants that the termination was
E invalid, on the balance of probabilities. As such, the issue of damages does not therefore arise to be considered.

Conclusion

[49] In the upshot, this appeal is hereby dismissed with costs. After hearing
F submissions on costs we award cost of RM150,000 here and below (as a global cost for both defendants), to be paid by the first appellant. We also order that the deposit be refunded to the plaintiffs.

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